IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 22931 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHREE DEVKRUPA SHIP BREAKING & 1 - Petitioner(s)
Versus
UNION OF INDIA & 3 - Respondent(s)

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Appearance :
MR PARESH M DAVE for Petitioner(s) : 1 - 2.
MR JITENDRA MALKAN for Respondent(s) : 1,
RULE NOT RECD BACK for Respondent(s) : 2 - 4.

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 30/11/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 This petition primarily challenges order No.A/621/WZB/2005/C III dated 22/3/2005 passed by the Customs Excise Service Tax Appellate Tribunal (CESTAT), West Zonal Bench, Mumbai.

2 Brief facts which are necessary for the present may be stated.

2.1 The dispute between the petitioner and the Customs Authorities arose in relation to a ship purchased by the petitioner firm from Shipping Corporation of India Limited for the purpose of breaking up the ship. The dispute centered round the fact as to whether the ship which was built in India and registered in India was amenable to

the customs duty - the case of the petitioner being that no duty was leviable. The petitioner having been called upon to pay the duty, deposited the same under protest. Thereafter, the petitioner agitated the claim by way of availing the statutory remedies and succeeded right upto the Tribunal. It is also the case of the petitioner that departmental appeal being Tax Appeal No.537 of 2004 came to be dismissed by this Hon'ble Court. In light of the aforesaid fact situation the petitioner made a claim for refund, though according to the petitioner it was not required to lodge any claim as such. Ultimately, proper officer sanctioned the refund claim but directed the same to be credited to the Consumer Welfare Fund. It is this order which came to be challenged by way of an appeal, in the first instance before the Commissioner (Appeals), and thereafter before CESTAT. On 22/3/2005 vide impugned order CESTAT dismissed

the appeal. Hence, the present petition.

3 Mr.Paresh M.Dave, learned Advocate appearing on behalf of the petitioner invited attention to the impugned order made by CESTAT to submit that the same was bad in law because it had not recorded any of the submissions made on behalf of the petitioner, nor had it given its finding so as to indicate what were the points which arose for consideration before it. In support of the proposition he placed reliance on the judgment of this Court in the case of *Deep Plastic Products Vs. Assistant Commissioner rendered on 29/4/2005 in Special Civil Application No.2681 of 2005.*

4 Mr.Jitendra Malkan, appearing on behalf of the respondents, more particularly respondent Nos. 1,3 & 4 requested for time at the outset to tender affidavit-in-reply. However, the said request has been declined considering that the issue involved is purely a legal proposition and

its applicability, and further in light of the view that the Court is inclined to adopt. On merits Mr.Malkan submitted that the petition had been filed on 25/11/2005 and thus went to circumvent the period of limitation prescribed statutorily for preferring Tax Appeal. Therefore, the petitioner should not be heard, the petitioner having failed to avail of the statutory remedy within the prescribed period of limitation. He accepted the legal position that CESTAT is final fact finding authority and in this connection he invited attention to Apex Court decision in case of *Standard Radiators Pvt.Ltd. Vs. Commissioner of Central Excise (2002) 10 SCC 740.*

5 As can be seen from the impugned order of CESTAT, in paragraph No.1 it records :

> "Heard both sides. After hearing both sides , we find that the issue involved in the present case

> attracts para 99(iii) of Mafatlal Inds. Vs. Union of India, reported in 1997(89) ELT 247. Para 99 is reproduced as under :"

Thereafter, extract of entire paragraph No.99 of the Apex Court decision in case of Mafatlal Inds. (supra) has been reproduced followed by paragraph No.2 which reads as under :

> "2. Therefore, we do not find any illegality in the order passed by the Commissioner (A), the appeal filed by the appellant is, therefore, dismissed."

6 It is thus apparent on plain perusal of the impugned order that CESTAT, which is the final fact finding authority, ought to have taken due care and shown greater consideration to the case than is shown by the order under challenge. As laid down by the Apex Court in the case of *Standard Radiators Pvt.Ltd.*(supra) "It is expected that it will discuss the facts in some detail and not cursorily and come to briefly stated conclusions on that

basis".

7 The impugned order unfortunately does nothing of that sort as already noticed hereinbefore. The entire order is silent as to what were the contentions raised before it by both the sides, what were the material facts for decision, what was the evidence pro and contra in relation to the said issue and what was the finding of facts on each of the contentions raised before CESTAT by both the sides. During course of hearing, a faint attempt on behalf of the respondent authority was made to submit that once the Tribunal accepts the findings recorded by Commissioner (Appeals) it is not necessary for it to reiterate the same and hence no fault should be found with the impugned order. The proposition would have been acceptable provided the impugned order had even given an indication to this effect. The Tribunal has not even cared to state that the findings recorded by the Commissioner

(Appeals) are not disputed. In fact, the principal grievance on behalf of the petitioner is that none of its submissions have been taken into consideration.

8 There is one more reason why CESTAT is required to give reasons after recording findings while passing an order. The said order is amenable to statutory appeal. How does the High Court, which is an appellate authority under the statute, appreciate the correctness or otherwise of an order made by CESTAT in absence of any reason in the order made by CESTAT. For this reason also the impugned order cannot be permitted to stand.

9 The proposition enunciated in paragraph No.99(iii) of the decision of Supreme Court in the case of *Mafatlal Industries* itself goes to show that an assessee seeking refund has to establish that he has not passed on burden of

duty or to the extent he has not so passed on as the case may be, would he become entitled to refund of duty. Whether the duty was paid under protest, whether it was recovered from the purchaser of the goods, etc. are issues which could be decided only after recording facts and appreciating evidence which has come on record. It goes without saying that a legal proposition cannot be invoked and applied in abstract. It has to be preceded by a foundation of facts and evidence on record. In the impugned order CESTAT has singularly failed to undertake the said exercise.

10 In these circumstances, it is not possible to let the impugned order made by CESTAT to operate. Hence, Order No. A/621/WZB/2005/C-III dated 22/3/2005 (Annexure-F) made by CESTAT is hereby quashed and set aside.

11 The appeal of the petitioner, in the circumstances, is restored to the file of CESTAT and CESTAT is directed to hear the same on merits afresh after giving proper and reasonable opportunity of hearing to both sides.

12 Rule made absolute. The petition is accordingly allowed. There shall be no order as to costs.

Sd/- Sd/-

(D.A.Mehta, J) (H.N.Devani, J)

m.m.bhatt